

BEFORE THE  
Federal Communications Commission

WASHINGTON, D.C.

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MAR 18 1992

Federal Communications Commission  
Office of the Secretary

In re Petition of

WISCONSIN VOICE OF CHRISTIAN  
YOUTH, INC.

For Amendment of § 73.606,  
TV Table of Allotments, to Delete  
Channel 14 from Suring, Wisconsin  
and to Add Channel 14 at Appleton,  
Wisconsin

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FILE

To: Chief, Allocations Branch

OPPOSITION TO PETITION FOR RECONSIDERATION AND REINSTATEMENT

Aries Telecommunications Corporation ("Aries"), licensee of WGBA(TV), Green Bay, Wisconsin, by its attorneys, hereby opposes the Petition for Reconsideration filed by Wisconsin Voice of Christian Youth, Inc. ("WVCY"), licensee of WSCO(TV), Suring, Wisconsin, on August 26, 1989.<sup>1/</sup> WVCY's petition seeks reconsideration of the staff's return without consideration of WVCY's petition for rule making, which requested amendment of the television table allotments to change the community of license of WSCO(TV) from Suring, Wisconsin to Appleton, Wisconsin. As explained herein, the Commission's action in dismissing the petition without consideration was entirely correct and should not be disturbed.

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<sup>1/</sup> This opposition is not untimely because the petition for rulemaking was never put on public notice. Moreover, Aries was not the licensee of WGBA at the time the petition was filed, and only recently learned of the petition. The opposition addresses matters of substantial public interest importance, including the preservation of spectrum for the implementation of advance television service.

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1. WVCY's petition for rule making was dismissed for two reasons. First, the petition failed the threshold test of acceptability since it would not result in a preferential distribution of facilities under the Commission's allotment priorities. Second, the proposal violates the metropolitan area television allotment freeze. See Order, MM Docket 87-268, released July 17, 1987.

Section 307(b)

2. On reconsideration, WVCY argues that dismissal of its petition for failure to meet the threshold test of a preferred distribution of facilities was inappropriate because that determination can only be made after the merits of the proposal have been explored through notice and comment procedures. Petition for Reconsideration at 2. Specifically, it argues that the station "may ultimately be forced to go dark" if the reallocation is not allowed. Id. at 3. WVCY contends that the proposal should not be dismissed just because Suring would lose an allotment, but that all "pertinent public interest factors must be considered." Id. at 3-4.

3. WVCY's arguments disregard the Commission's Report and Order (Community of License Modifications), 4 FCC Rcd. 4870 (1989) and its Memorandum Opinion and Order (Reconsideration), 5 FCC Rcd. 7094 (1990), in which the Commission adopted and refined, respectively, the procedures for and limitations on changes of communities of license for FM and TV stations. Those orders make clear that: (1) all community of license changes must advance the Commission's allotment priorities, and implicitly,

the goals of Section 307(b) of the Communications Act<sup>2/</sup>; (2) proposals that would reduce the number of communities enjoying local service are presumptively contrary to the public interest<sup>3/</sup>; and (3) the Commission is "particularly hesitant to deprive an area of an existing first or second reception service".<sup>4/</sup>

4. WVCY's proposal runs afoul of all three of these tenets. WVCY proposes to delete an allotment at Suring that constitutes the community's only local television service, a second level allotment priority, in order to add a second television allotment at Appleton, Wisconsin, a fourth level priority.<sup>5/</sup> The petition thus proposes an amendment that is prima facie inimical to the public interest and to the objectives of Section 307(b) of the Communications Act.

5. Second, the proposal would reduce the number of communities with local service by moving the station from a Suring, where it is the only local television service, to Appleton, which already has a local station. Moreover, Appleton is also well served by several television stations licensed to Green Bay, as well as four local radio stations. As the Commission wrote in Community of License Modifications at ¶ 18, such proposals are presumptively contrary to the public interest.

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<sup>2/</sup> See, e.g., Community of License Modifications at ¶ 29, Reconsideration at ¶ 11.

<sup>3/</sup> Reconsideration at 7097.

<sup>4/</sup> Community of License Modifications at ¶ 28.

<sup>5/</sup> Reconsideration at n. 4.

6. Third, according to Figure 1 of the engineering statement appended to the petition for rule making, the proposal would create a substantial gray area and leave another area with only two signals. These undeserved areas would be created even under a best case scenario, which assumes a fivefold power increase for the station and increased antenna height. If lesser facilities were applied for or approved, the gray area would be substantially larger. This directly implicates the Commission's hesitancy to deprive any area of its existing first or second reception service.<sup>6/</sup>

7. WVCY's petition does not seriously dispute that its proposal is prima facie contrary to the public interest and to FCC policy, but asserts that it should be granted a waiver because it claims Suring is incapable of supporting a full-service television station. Petition for Reconsideration at 2, Petition for Rulemaking at 3-4. The Petition for Rulemaking asserts that, despite extensive expense cutting and fund raising activities, WVCY has been "unable to meet the station's financial needs". WVCY alleges that its present income is not sufficient to allow it to meet current expenses or repay debt.<sup>7/</sup>

8. This argument fails for two reasons. First, nothing in the Commission's re-allotment policy recognizes financial

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<sup>6/</sup> WVCY correctly acknowledges in its Supplement to Petition for Reconsideration and Reinstatement that the fact that Suring is served by a local FM station is irrelevant to the Section 307(b) analysis of proposals to re-allot television stations.

<sup>7/</sup> These assertions raise substantial questions as to whether WVCY is financially qualified to construct and operate the modified facilities it requests.

hardship as a basis for consideration of such petitions. Rather, the consideration is purely the extent to which any proposal advances Section 307(b) objectives as expressed in the Commission's allotment priorities. Second, even assuming that financial hardship was a valid allotment consideration, none of the pleadings filed by WVCY over the course of two years provides so much as a short declaration regarding the station's alleged financial hardship, much less any objective, supporting documentation. Even if there were any precedent for waiving the Commission's allotment priorities or the strictures of its re-allotment policy on the basis of economic hardship, no such showing has been made here.

9. Finally, the Commission's Reconsideration order in particular emphasized that the new policy would not be applied in a manner that would result in the migration of "rural" stations to major population centers, leaving behind unserved and undeserved areas. Id. at ¶ 13. WVCY argues at page 6 of its petition for reconsideration that the Community of License Modification order stated that the allotment priorities should be applied in a "flexible" fashion. WVCY thus implies that the Commission should apply its rules flexibly to allow it to relocate from a "rural" to an urban area despite the clear impropriety of the proposal. In fact, the flexible interpretation of the rules to which the Commission referred are intended to prevent rural stations from migrating to urban areas by proposing to relocate to suburban communities. In such cases, rigid application of the allotment priorities might permit such a

result. Reconsideration Order at ¶ 14. WVCY's requests "flexible interpretation" to achieve a result entirely opposite from the purpose of that policy. The request for waiver must be denied.

#### The Television Freeze

10. The Commission also rejected WVCY's petition on the grounds that the proposal to re-allot WSCO to Appleton violates the freeze on all allotments that fall within a zone around the fifty largest television markets defined by the minimum mileage separation for cochannel stations. Order, MM Docket 87-268, released July 17, 1987 WVCY argues that its proposal is not subject to the freeze because the freeze does not apply to changes by existing stations. Petition for Reconsideration at 5-6.

11. The flaw in this reasoning is patent. WVCY does not seek a modification of its present Suring facility, but a new Appleton facility that is related to the Suring facility only in their mutual exclusivity. Notably, WVCY has not filed an application with the TV Branch, but a Petition for Rulemaking with the Allocations Branch. WVCY seeks precisely what the freeze prohibits: amendment of television table of allotments within the protected zone of a top 50 market.

12. The Petition for Reconsideration advances the ludicrous argument that the proposal would not result in any "real decrease in broadcast spectrum available for new technologies in the Milwaukee area" because Channel 14 is already in use in the Milwaukee's protected area. In fact, as pointed out in the staff

letter returning the petition for rule making, Appleton is closer to Milwaukee than is Suring. Moreover, the petitioner apparently intends to apply for a fivefold increase in power. The claim that the proposal will have no additional preclusive effect in Milwaukee is preposterous.

13. The Petition for Reconsideration concludes with a conditional request for waiver of the freeze should the Commission deem the freeze to apply. The basis asserted in support of waiver is a non-specific reference to "reasons set forth herein and in its petition". Id. at n. 4. Presumably this is a reference to its economic hardship claim. As stated above, WVCY's allegations of economic hardship are imprecise and wholly unsubstantiated, and it has offered no explanation of why economic hardship constitutes a "compelling reason" for waiver of the freeze for WSCO to the prejudice of options for advanced television service.

For the reasons explained herein, Aries respectfully requests that the WVCY's petition for reconsideration be denied.

Respectfully submitted,

ARIES TELECOMMUNICATIONS  
CORPORATION

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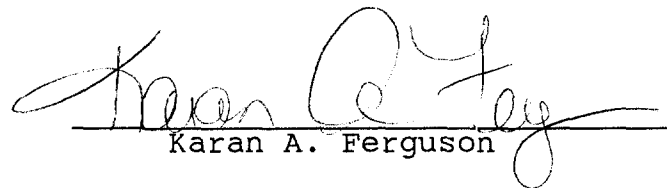
March 18, 1992

CERTIFICATE OF SERVICE

I, Karan A. Ferguson, a secretary in the law firm of Fisher, Wayland, Cooper & Leader, do hereby certify that true copies of the foregoing "OPPOSITION TO PETITION FOR RECONSIDERATION AND REINSTATEMENT" were sent this 18th day of March, 1992, by first-class United States mail, postage prepaid, to the following:

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